GREENSBURG NAT. BANK *v.* C. SYER & CO. *et al.*

Jan. 18, 1912.

[73 S. E. 438.]

1. Banks and Banking (§§ 127, 159*)—Drafts—Ownership.—If a bank received a draft as a deposit to be treated as cash by the depositor, according to the intention of the bank and the depositor whon it was deposited, the title thereto passed to the bank; but, if the intention was that the bank should only receive the draft for collection, title did not pass to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310, 547-553; Dec. Dig. §§ 127, 159.*]

2. Appeal and Error (§ 215*)—Objection in Trial Court—Instructions.—An instruction not excepted to below is the law of the case, though erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

3. Evidence (§ 235*)—Admissions—Drawer of Draft.—After the drawer of a draft has parted with the title thereto to his bank, no subsequent admissions or conduct of his can prejudice the bank's rights.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 873-875; Dec. Dig. § 235.*]

4. Banks and Banking (§ 154*)—Deposit of Draft—Title—Evidence.—Evidence held to show that a draft with bill of lading attached was deposited by the drawer in his bank for collection, and not so as to pass title thereto to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 154.*]

Error to Law and Chancery Court of City of Norfolk.

Action, aided by attachment, by C. Syer & Co. against J. M. Hornung, in which the Greensburg National Bank intervenes as claimant of the attached funds. Judgment for plaintiff against the original defendant directed to be paid out of the fund, and the bank brings error. Affirmed.

Loyall, Taylor & White, for plaintiff in error.
Jeffries, Wolcott & Lankford, for defendant in error.

KEITH, P. Syer & Co., of Norfolk, purchased of J. M. Hornung, of Greensburg, Ind., a car load of flour. When the flour was shipped, Hornung attached the bill of lading to a draft on Syer & Co. for $1,062, and deposited the draft in the Greens-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

burg National Bank of Greensburg, Ind. Upon arrival of the flour at Norfolk, Syer & Co. claimed that it was of inferior quality and refused to pay the draft which had been presented to them by the Citizens' Bank of Norfolk, through which the draft had come from the Greensburg National Bank. Syer & Co. notified Hornung of their dissatisfaction with the flour, and thereupon Hornung wired Syer & Co. to draw on him for the amount of the depreciation in the value of the flour. Syer & Co. did not take up the draft, but drew on Hornung for the depreciation, which draft Hornung refused to pay, and upon his refusal Syer & Co. went to the Citizens' Bank of Norfolk, took up the draft for $1,062, and immediately brought suit against Hornung for the amount of the depreciation in the flour and attached the money in the hands of the Citizens' Bank of Norfolk as the property of Hornung.

The Greensburg National Bank was allowed to intervene as claimant of the fund held by the Citizens' Bank, and thereupon moved to quash the attachment on the ground that the fund was not the property of Hornung, but belonged to the Greensburg National Bank, and that the attachment was issued upon false suggestion. The matter was submitted to a jury, who found that the money in the bank was the property of Hornung and subject to the attachment of Syer & Co.; a judgment was entered in favor of Syer & Co. against Hornung for $420, the amount of the depreciation in the flour, which was directed to be paid by the Citizens' Bank out of the fund which had been attached in its hands; and thereupon the Greensburg National Bank obtained a writ of error from this court.

Defendants in error urge several formal objections to the course of procedure in the trial court, which, in the view we take of the case, need not be here considered.

The draft deposited by Hornung in the Greensburg National Bank was listed on the following slip:

Deposited in
Greensburg National Bank
of
Greensburg, Ind.
By J. M. Hornung, August 14, 1909.
Please list each check separately.

	Dollars.	Cents.
Currency		
Gold		
Silver		
Draft, C. Syer & Co.....	1062	00

Certain entries in Hornung's passbook were introduced in evi-

dence, consisting of several items of cash during the month of August, 1909, then an entry on the 14th, "Syer & Co. $1,062.00," followed several entries of cash during the same month.

The plaintiff proved by a witness, the vice president of the Seaboard Bank of Norfolk, that he had been engaged in the banking business for a number of years and was acquainted with the customs and usages among bankers throughout the country as to the manner of handling drafts for their customers; that it was the general usage and custom to permit a customer to deposit a draft with the bank for collection, and pass the amount thereof to the credit of the customer, and to permit the customer to check upon the amount so credited, the recognized understanding being that, when the draft is received by the bank for collection, it may be charged back to the customer's account at any time if not paid; that this is recognized merely as a favor from the bank to the customer, at the option of the bank, dependent largely upon the confidence the bank has in the customer, and the extent of his dealings with the bank. On cross-examination this witness testified, further, that it was the custom of banks to purchase drafts as well as to take them for collection; that, from an inspection of the draft in this case, the deposit slip, and bank book, it was evident that the draft was discounted by the bank and that J. M. Hornung received cash for the same; that the draft shows on its face that it was deposited in the Greensburg National Bank as cash, and not for collection; that the indorsements on the back of the draft show it was handled by the banks whose stamps appear thereon for collection; and that the bank book shows that the bank had not been reimbursed by J. M. Hornung, or by the collection of the draft.

It further appears in the evidence on behalf of the Greensburg National Bank that it received from Hornung a draft with bill of lading on Syer & Co. for $1,062 for credit to Hornung; that the draft was presented with the passbook of John M. Hornung, and the sum of $1,062, was credited on Hornung's passbook, and the account of Hornung, on the general ledger was credited with a like amount; that, in saying that Hornung was credited with that amount, the witness meant that for that amount Greensburg National Bank became the debtor of Hornung and that he became the creditor; that the draft was forwarded by the Greensburg National Bank with instructions to collect and place the proceeds to its credit; that the amount of the draft was charged on its general ledger to an account as "due from other banks;" that it was the custom of banks, when drafts were received from strangers, or when presented by customers for collection only, to forward the drafts to the proper point for collection, and the proceeds when received were credited to the

proper party, and in that case the draft would not become the property of the bank, but it would be acting as agent for the payee of the draft; that in such case in its indorsement on the draft there would appear the words, "for collection;" that the credit which was given Hornung for the draft in dispute had never been canceled or charged off on his account; that at the time the draft in question was received by the Greensburg Bank Hornung's account was overdrawn $91.68; that after the deposit of that draft there was a balance to his credit of $970.32; that Hornung had no authority or right from the Greensburg National Bank to instruct the Citizens' National Bank at Norfolk, or C. Syer & Co., or any one, to reduce the amount of the draft in question in the payment thereof; that, when the draft was received by the Greensburg National Bank, it was the intention of the bank to purchase the draft for the sum stated therein and credit the amount of John M. Hornung the same as if it had been that amount of actual money. The testimony of another witness introduced by the bank is substantially to the same effect.

[1] After the testimony was closed, the court gave to the jury the following instruction: "The court instructs the jury that the question as to whether or not the title to the draft deposited by Hornung with the Greensburg National Bank passed to the bank or remained in Hornung is one of the facts to be determined by the jury, under all the facts and circumstances of this case as proven by the evidence. If the jury believes from the evidence that the Greensburg National Bank received the draft as a deposit to be treated as cash, and that such was the intention of said bank and Hornung at the time said draft was deposited, then title to the draft passed to the bank and the jury should find in its favor; but if the jury believes from the evidence that it was the intention of the bank and Hornung, at the time of the deposit of the draft, that said draft should not be received as cash, but only by the bank as an agent for collection, then the title to the draft did not pass to the bank, and the jury should find for the plaintiff. Checks or drafts deposited or credited, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected."

[2] This instruction was not objected to by either party to the controversy. It is, we believe, a correct statement of the law, and, in any event, there being no exception to it, it is the law of this case.

Defendants in error rely upon the following propositions, which are shown in evidence, as being sufficient to maintain the verdict and judgment complained of: That the transaction was in line with the regular custom among banks in crediting such col-

lections for the accommodation of their regular depositors; that Hornung was an old depositor of the bank of six or seven years standing; that the draft was not discounted, but the whole amount thereof was placed to Hornung's credit; that it was deposited as paper, and not as cash; that it was treated and dealt with by Hornung and his attorneys, in his correspondence with Syer, as his property and under his control; that the attorneys who appeared for Hornung in dealing with Syer & Co. also appeared for the bank in the taking of depositions; that, instead of requiring protest and notice of dishonor to be given or waived so as to hold the maker and indorsers liable in case of dishonor, the bank directed that no protest should be made, showing that it did not look to the maker for recourse as such under the laws governing the transfer of negotiable instruments; but that the draft was regarded as being still Hornung's paper, which, under the custom and usage shown to exist, could be charged back to him at any time.

The jury, as we have seen, found a verdict for the plaintiff; the court entered judgment upon that verdict; there was no exception to the law, as stated to the jury by the court; and the case is before us upon a demurrer to the evidence. Our only province, therefore, is to consider whether or not there be sufficient testimony to sustain the verdict of the jury.

In Lynchburg Milling Co. *v.* National Exchange Bank, 109 Va. 639, 64 S. E. 980, the plaintiff in error, who was the plaintiff in the court below, brought an action of assumpsit against White & Rumsey Grain Company of Chicago, and issued an attachment upon the effects of the defendant in the possession of the National Exchange Bank. The bank answered, denying the suggestion, but stated by way of explanation that it had received from and on account of the Continental National Bank of Chicago a draft drawn by the defendant, the White & Rumsey Grain Company, on the plaintiff, the Lynchburg Milling Company, in favor of the Chicago bank for $533.35 for collection, to which draft a bill of lading was attached for a car load of oats shipped by the defendant to the plaintiff; that the draft was paid by the plaintiff to respondent, and the amount placed to the credit of the Chicago bank, but the fund was not remitted because of the pendency of the attachment. And the question considered was to whom the money attached belonged—whether to the White & Rumsey Grain Company, or to the Chicago bank. It was held in that case to be the property of the latter, and that the attachment had been sued out upon false suggestion. A circumstance relied upon by plaintiff in error in that case was that the drawer waived protest and notice; but this court was of opinion that the circumstance was not inconsistent with the Chicago bank's bona

fide ownership of the draft. The court did not hold that it was not a pertinent fact to be considered along with other circumstances in determining the question of ownership.

In the case of St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, the court said, speaking of deposit of a draft in bank: "If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain." And in the same case it was said that the fact that the draft was entered at its full value indicated that it was not discounted but credited for convenience and in anticipation of its payment.

In Bailie *v.* Augusta Savings Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74, Chief Justice Simmons, speaking for the Supreme Court of Georgia, said: "In the absence of anything indicating a different understanding, a bank which in the ordinary course of business receives from a depositor a check upon another bank, and credits it on his deposit book, not as cash, but as a check, will not be held to be an absolute purchaser of the check. If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper."

[3] It is insisted by counsel for plaintiff in error that no importance should be attached to the correspondence between Hornung and his attorneys and Syer & Co. with respect to this draft after Syer & Co. had refused payment, upon the ground that before this correspondence took place Hornung had parted with all interest in the draft, the title to which had passed to the Greensburg National Bank, and that Hornung no longer had any interest in or control over it.

The trouble with this objection is that it assumes the truth of the very fact which is the subject of inquiry—the ownership of the draft in question. The introduction of the evidence was not objected to. It would have been proper, if the court had been requested so to do, for it to have stated to the jury that Hornung's admissions or conduct with respect to this draft could not prejudice the Greensburg National Bank after Hornung had parted with his entire interest in it; but no such request was made, and no such limitation imposed, and the jury, under the circumstances, might very well have thought that Hornung would not have authorized Syer & Co. to reduce the draft by the amount of the depreciation unless he had some control over the subject.

[4] Looking to the whole case as it was presented to the jury, the custom among bankers, the relation of Hornung to the Greensburg National Bank as a depositor of many years standing, that the draft was not discounted, that the whole amount thereof was

placed to Hornung's credit, that it was deposited as paper and not as cash, that it was treated and dealt with by Hornung and his attorneys as his property in their correspondence with Syer & Co., and that protest was waived, it presents a case in which this court cannot say that the verdict of the jury, rendered upon proper instructions and approved by the trial court, was without evidence to sustain it, and therefore the judgment complained of is affirmed.

Affirmed.

Note.

At first glance it is hard to see a line of distinction between the principal case and that of the Lynchburg Milling Co. *v.* National Ex. Bank, but on a closer inspection we think there are some differences.

We at first thought that the distinction lay in what we supposed was the fact that in the Lynchburg Milling Co. case the drawee paid a draft, drawn by its debtor on itself **in favor of third party,** and attached proceeds in respondent's hands as belonging to its debtor, while in the principal case the drawee paid a draft, drawn by its debtor on itself to debtor's own order **(or at least not directly to the third party,** to whom it was merely passed by indorsement, as it seems), and attached proceeds in respondent's hands. The third party, a bank in each case, claimed the proceeds.

At least we thought we had deduced from the statement of facts in the opinion that there was this distinction, but we find, having had the advantage of examining the record in the principal case just before this annotation goes to press, that we were mistaken (although we still think that the statement of the case in the opinion justified us), and that the two cases are exactly on all fours in this particular.

This being the case, it seems to us very probable that the Supreme Court of Appeals would have allowed the verdict to stand had it been the other way, and that the question was a mixed one of law and fact whether the bank taking and forwarding the paper did so for collection merely or became the absolute owner, to be decided by the jury under proper instructions.

The principal case was decided by a jury under an instruction to which there was no objection made, and the court refused to disturb their verdict on error. The Lynchburg Milling Co. case was decided upon a demurrer to the evidence, and a jury verdict subject thereto. Opposite conclusions were reached in the two cases as to the ownership of the proceeds of the draft attached in the collecting bank's hands. But the evidence and facts were somewhat different. For example, the letter of the debtor to the respondent bank in the Milling Co. case, disclaiming ownership and attributing it to the claimant bank, put in evidence by the plaintiff in the attachment, must have had weight on the question of ownership.

There seems to have been nothing to prevent the respondent from demurring to the evidence in the principal case, had it chosen to do so, and thus make the court decide the case, as in the other case.

(We here note that the court in its opinion says: "The case is before us on a demurrer to the evidence." Nothing was said in the statement of the case as to a demurrer to the evidence being put in, so we cannot but suppose that the court meant to say "the case is before us **as upon** a demurrer," etc.)

What is said by the court as to Hornung having "authorized Syer

& Co. to reduce the draft," does not seem consonant with the recital of the facts in the first part of the opinion. It was there stated the Hornung wired Syer & Co. to draw on him for the depreciation, not to reduce the amount of the draft already sent forward by the Greensburg bank, and the very fact that he did so, seems to indicate strongly that he recognized that he had parted with all right to control the other draft, and adopted this method of making allowance for the depreciation, i. e., through a new transaction independant of the other draft and what had been already done in relation thereto.

He did not attempt to interfere with the first draft, probably because he recognized that he had no control over the subject, thereby making the just inference the opposite of that stated by the court here.

The effect attributed to the waiver of protest and notice by the forwarding bank seems to have been the same in each case, i. e., to leave it as an element to be weighed by the jury. It was not inconsistent with the ownership by the forwarding bank of the draft.

J. F. M.

CITY OF RADFORD *v.* CLARK.

(Richmond, January 25, 1912.)

1. Municipal Corporations—Tort of Agents or Employees—Liability.—In order to render a municipal corporation liable in damages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment.

2. Idem—Operation of Quarry—Ultra Vires—Liability for Injury.—Though it may be convenient or even profitable for a municipal corporation, in order to perform certain duties imposed upon it, to own and operate a rock quarry, it has no power to do so unless that power is in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted; and where the power is not so conferred there is no liability upon the municipality for a tort committed by its agents or servants while operating such a quarry, whether within or outside of the corporate limits.

3. Idem—Defect in Highway—Public Nuisance—Noises Outside Limits of Highway.—Noises outside the limits of a highway, amounting to a public nuisance, are not a defect in the highway, and a municipal corporation cannot be held liable for failure to prevent such a nuisance.

Error to Circuit Court of Montgomery county. Reversed.

Harless & Colhoun and *H. C. Tyler,* for the plaintiff in error.
Longley & Jordan, for the defendant in error.